DATO' SERI ANWAR IBRAHIM A

v.

TUN DR MAHATHIR MOHAMAD

HIGH COURT MALAYA, KUALA LUMPUR B
TENGKU MAIMUN TUAN MAT JC
[SUIT NO: S4-23-15-2006]
9 JULY 2007

CIVIL PROCEDURE: *Striking out - Defamation action - Similar facts, issues and defences determined in earlier action between same parties - Whether issue estoppel applicable - Whether also qualified privilege - Whether defences could be dealt with at preliminary stage - Rules of the High Court 1980, O. 18 r. 19(b), (d)* C

This was the defendant's application to strike out the plaintiff's action under O. 18 r. 19(b) or (d) of the Rules of the High Court 1980 ('RHC'). The plaintiff, the former Deputy Prime Minister of Malaysia, commenced the action against the defendant, the former Prime Minister of Malaysia, for defamation arising out of the words uttered by the defendant in response to questions posed to him at a press conference. The plaintiff alleged that the defamatory words uttered by the defendant were that "I cannot have a sodomiser in my cabinet" and "Imagine a gay PM … nobody will be safe". The defendant in support of his striking out application claimed, *inter alia*, that there was a judicial decision in previous proceedings between the same parties ('the 1999 defamation action') such that issue estoppel was applicable. Further, the defamatory words were made on an occasion of qualified privilege. D E F

Held (allowing the defendant's application): G

(1) It could not be said that the 1999 defamation action was not litigated and decided or that it was decided just on a preliminary issue. The whole of the plaintiff's case was considered *albeit* by affidavit evidence whereby the court concluded that it was obviously unsustainable. Although the publication of the offending words in the present suit and in the 1999 defamation action took place on different dates, since similar facts, issues and defences were already decided in the 1999 defamation action, issue estoppel was applicable in the present case. (para 10) H I

(2) It did not matter that the judgment in the 1999 defamation action was given on an O. 18 r. 19 RHC application. What mattered was that the 1999 defamation action had "necessarily and with precision" determined the issues between the plaintiff and the defendant. (para 10)

(3) Having regard to the judgments of the High Court, the Court of Appeal and the Federal Court in the 1999 defamation action, the defences of justification and qualified privilege were similarly available to the defendant. In fact there was a judicial finding that the plaintiff had indeed taken part in homosexual acts. The defendant as the former Prime Minister with a duty and interest to respond to questions posed to him from the media, uttered the offending words on an occasion of qualified privilege. The principle cited in *S Pakianathan v. Jenni Ibrahim* was followed. (paras 11, 12 & 13)

(4) Given the background facts of this case and the judgments referred to, it was apparent that the defences were bound to succeed. No purpose would be served in insisting that the defences be proved at a full trial. It followed that the plaintiff's action was obviously unsustainable. (para 15)

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [1999] 7 CLJ 32 HC ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [2001] 1 CLJ 519 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [2001] 1 CLJ 663 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 3 CLJ 737 FC ***(refd)***

S Pakianathan v. Jenni Ibrahim [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***

Tong Lee Hwa & Anor v. Lee Yoke San [1979] 1 MLJ 24 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(b), (d)

For the plaintiff - Raja Aziz Addrusse (Dato' Cumarasamy, SN Nair & Wan Anuar Shaddat Mohamed Amin with him); M/s SN Nair & Partners

For the defendant - Dato' V Kanagalingam (V Sithambaram & R Thayalan with him); M/s VK Lingam & Co

Reported by Usha Thiagarajah

JUDGMENT

Tengku Maimun Tuan Mat JC:

[1] The background facts of this case may be briefly stated as follows. The defendant was the Prime Minister of Malaysia from July 1981 until his retirement in October 2003. The plaintiff was the Deputy Prime Minister from 1993 until he was dismissed by the defendant on 2 September 1998 following allegations of corruption and criminal sexual conduct.

[2] On 19 September 1998 Dr Munawar Ahmad Anes (Munawar) and Sukma Darmawan Saasmitaat Madja (Sukma) were charged and convicted at the Sessions Court in Kuala Lumpur for allowing the plaintiff to sodomise them and were sentenced to six (6) months imprisonment respectively. On 22 September 1998 the defendant as the Prime Minister held a press conference and was asked questions concerning the plaintiff. The words then spoken by the defendant formed the subject of the plaintiff's suit filed on 26 January 1999 against the defendant ('the 1999 defamation action').

[3] In the present suit, the plaintiff's claim against the defendant is for various damages for defamation arising out of the words uttered by the defendant that "I cannot have a sodomiser in my cabinet"; "Imagine a gay PM ... nobody will be safe" which the plaintiff alleged were defamatory of him. The plaintiff pleaded that the offending words in their natural and ordinary meaning were understood to mean *inter alia* that the plaintiff was a homosexual.

[4] The words complained of by the plaintiff in this action were spoken in response to questions posed by journalists to the defendant at a Conference organized by SUHAKAM entitled "Human Rights and Globalisation" on 9 September 2005. The defendant delivered the Opening Address and at the end of the address, question concerning human rights were directed to the defendant. The questions and answers giving rise to the offending words are as follows:

> Q: Tun, your detractors say that you committed the same things when people spoke against you. You detained them and you arrested them.
>
> A: Which one?
>
> Q: Ops lalang

A: Ops lalang was not because they speak against me. You must be very precise. You know, it is not because they spoke against me. It is because they brought up issues like Chinese education and all that and because of that there was a lot of tension between the Malays and Chinese and the ISA has always been used in order to dampen down any tension. It is not because they spoke against me ... You tell me which one of them spoke ...

Q: The Deputy Prime Minister.

A: The Deputy Prime Minister did not speak against me.

Q: So none of it, so you are saying, you never spoke, used it.

A: Ya, but the press makes it up. The press makes out that I have something against my Deputy. In our society sodomy is not acceptable. Of course, among some media people even, they they they are gay. So they don't like my taking action against a person for the kind of thing that they indulge in. So I became a bad guy because of that. But I cannot have a person who is like that in my Cabinet who may succeed and become the Prime Minister. Imagine having a gay Prime Minister nobody will be safe.

[5] Enclosure 10 is the defendant's application to strike out the plaintiff's claim under O. 18 r. 19(b) or (d) of the Rules of High Court 1980. The application by the defendant is premised on the ground that this action is an abuse of the process of the court such that it should be struck out for all or any of the following reasons:

(i) There has been a judicial decision in previous proceedings between the same parties (the 1999 defamation action) such that issue estoppel applies;

(ii) There is an un-reversed judicial finding in criminal proceedings against the plaintiff that he has taken part in homosexual acts;

(iii) Another man still stands convicted of taking part with the plaintiff in homosexual acts;

(iv) This action is otherwise an abuse of the process of the court;

(v) The publication complained of in this action was true; it was incontestably a publication made upon an occasion of qualified privilege and the publication complained of was fair comment on a matter of public interest and there is no defence of malice sufficient to defeat that defence.

[6] In response to the defendant's application, learned counsel for the plaintiff argued *inter alia* that for estoppel to apply, the issues in the 1999 defamation action would have to be 'litigated and decided' and the judgment should not just be on preliminary issue. Learned counsel also relied on the fact that the conviction of Sukma has since been set aside, and that the confession of Munawar could not bind the plaintiff as the plaintiff was not a party to that confession. Further it was submitted for the plaintiff that the court cannot at a preliminary stage say that the defences are available to the defendant without the defences being proven at a trial.

[7] The offending words which form the subject matter of the present suit are identical to the words then complained of in the 1999 defamation action where the plaintiff complained of an allegation that he was a homosexual. As in the 1999 defamation action the defendant here pleaded the defences of justification and qualified privilege.

[8] The 1999 defamation action was struck out by Kamalanathan Ratnam J on the ground that the plaintiff's action was obviously unsustainable having considered the convictions of Sukma and Munawar and the defences of justification and qualified privilege (see [1999] 7 CLJ 32). The plaintiff's appeal to the Court of Appeal was dismissed. In *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [2001] 1 CLJ 519) Ahmad Fairuz JCA (as the Chief Justice then was) said at p 525:

> ... it is clear that the respondent was sheltered by the defences of justification and qualified privilege when he uttered the offending words or the statement. It is very plain and obvious that the claim of the appellant is obviously unsustainable ... .

[9] Leave to appeal to the Federal Court against the judgment of the Court of Appeal was refused. Although it is not the practice of the Federal Court to give explicit reasons for granting or refusing leave, the Federal Court has seen it desirable to state their reasons for the application by the plaintiff. In delivering the judgment of the Federal Court (see [2001] 1 CLJ 663), Mohamed Dzaiddin CJ said:

> Encik Karpal, for the applicant, formulated three questions for our consideration. However in the course of his submission he wanted leave to be granted only on two questions, namely:

A (1) Whether the Court of Appeal was right in holding the convictions of Sukma Darmawan and Dr Munawar Anees by the Sessions Court Kuala Lumpur and the admission of the facts read out in Court by both of them could constitute a defence of justification in respect of the offending words meriting dismissal of the applicant's suit under Order 18 rule 19 of the Rules of the High Court, 1980; and

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(2) Whether the Court of Appeal was right in relying on the principle in *Lange v. Atkinson* 3 NZLR [1988] 424 and concluding the decision of the learned trial judge on the issues of qualified privilege should not be disturbed having regard to the application to strike out the applicant's suit being one under Order 18 rule 19 of the Rules of the High Court, 1980.

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We are of the view that the question of law as distilled from the above questions for the consideration of the court is whether in a defamation action the High Court can decide on the defence of justification and qualified privilege without a trial to dismiss the applicant/plaintiff's suit against the defendant/respondent under O. 18 r. 19 RHC.

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E After reading the grounds of judgment of the trial judge ... we find he has correctly addressed the issues of justification and qualified privilege raised by the respondent in his defence. We hasten to add that he relied on the facts admitted and the confession as to the acts of gross indecency in the criminal cases involving Munawar and Sukma to found his finding that the words spoken of by the respondent constitute justification. On qualified privilege, we also find the learned trial judge had applied the correct test and law to the facts and circumstances of the case. In fact the correct authority on qualified privilege in the context of the respondent's defence is *Lange v. Australian Broadcasting Corporation* [1997] 189 CLR 520 and not *Lange v. Atkinson (supra)*.

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Therefore, in the circumstances of the case, the paramount consideration is whether the applicant would have a *prima facie* case for success should leave be granted on the question which we formulated above. Having agreed with the reasons and the conclusion of the learned trial judge on the defence of justification and qualified privilege after applying the law to the factual matrix of the case, it is our provisional view that should leave be granted, the applicant would not have any prospect of success.

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[10] I do not think it could be said that the 1999 defamation action was not litigated and decided or that it was decided just on preliminary issue as contended by learned counsel for the plaintiff. The whole of the plaintiff's case was considered *albeit* by affidavit evidence whereby the court concluded that it was obviously unsustainable. I am minded of the fact that since the publication of the offending words in the present suit and in the 1999 defamation action took place on different dates, it technically gave rise to a different cause of action. Nevertheless it is my view bearing in mind similar facts, issues and defences that had already been decided in the 1999 defamation action, issue estoppel would apply in the present case and the plaintiff's present action is clearly an abuse of the process of the court. It does not matter that the judgment in the 1999 defamation action was given on O. 18 r. 19 application for what matters is that the 1999 defamation action has 'necessarily and with precision' determined the issues between the plaintiff and the defendant (see *Tong Lee Hwa & Anor v. Lee Yoke San* [1979] 1 MLJ 24).

[11] Quite apart from issue estoppel, it is also my view that having regard to the judgments of the High Court, the Court of Appeal and the Federal Court in the 1999 defamation action, the defences of justification and qualified privilege are similarly available to the defendant here. Although the conviction of Sukma has since been set aside, there is in existence a judicial finding that the plaintiff had indeed taken part in homosexual acts. The finding was made by the High Court Kuala Lumpur whereby the plaintiff was convicted on a charge of sodomising Azizan bin Abu Bakar. This conviction was upheld by the Court of Appeal and although the plaintiff's appeal was allowed by a majority of the Federal Court (see [2004] 3 CLJ 737), there was a specific finding by the majority that "... we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometimes ...". Thus when the defendant uttered the offending words on 9 September 2005, he would be sheltered by the defence of justification given the finding of the majority of the Federal Court and the convictions of Munawar and Sukma which still stand, Sukma's conviction being quashed by the Court of Appeal only on 14 June 2006.

[12] There is no dispute that the offending words were spoken by the defendant in response to questions from a journalist. In *S Pakianathan v. Jenni Ibrahim* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 Wan Hamzah SCJ said:

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v. Longsdon*. These occasions are called occasions of qualified privilege. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v. Bush*. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it.

[13] Applying the above cited principle, clearly the defendant being a former Prime Minister and being under attack, and having a duty and interest to respond to such questions, uttered the offending words on occasion of qualified privilege.

[14] In so far as the argument of learned counsel for the plaintiff on the confession of Munawar is concerned, the same has in fact been raised and dealt with in the 1999 defamation action as could be seen in the Federal Court judgment referred to above. Similarly the point raised by learned counsel for the plaintiff that the defences ought to be proven in a full trial, has been dealt with by the Federal Court, which fortifies issue estoppel.

[15] Hence given the background facts of this case and the judgments referred to above, it is apparent that the defences are bound to succeed. No purpose would have been served in insisting that the defences be proven at a full trial. I therefore conclude that the plaintiff's action is obviously unsustainable and the defendant's application in encl. 10 is accordingly allowed with costs.